

BOARD OF APPEALS CASE NO. 012 *

BEFORE THE

APPLICANT: Caddie Homes #13, Inc. *

ZONING HEARING EXAMINER

REQUEST: Rezone 6+ acres from
R4 to CI; south of intersection of
Plumtree and Tollgate Roads, Bel Air *

OF HARFORD COUNTY

HEARING DATE: November 4, 1985
April 21, 1986 and May 5, 1986 *

Hearing Advertised
Aegis: 10/3/85 10/10/85
Record: 10/2/85 10/9/85

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ZONING HEARING EXAMINER'S DECISION

The Applicant, Caddie Homes #13, Inc., seeks to rezone a 6 acre parcel of land from R4 (Urban Residential) to CI (Commercial Industrial), in Abingdon, Harford County. The parcel is part of a 53 acre tract of land and is bound on the north by R1; to the west by R3; to the south by B2; and to the east by R4. A hearing was commenced on November 4, 1985, and a final hearing was held on May 5, 1986.

The law regarding rezoning has been defined on numerous occasions by the Maryland Courts. The cases are in agreement that there is a strong presumption of the correctness of the original zoning. In this case, the Harford County Council rezoned the property from R2 to R4 in September 1982.

In Agneslane Inc. v. Lucas, 247 Md. 612 (1966), the Court stated:

"The burden of proof facing one seeking a zoning reclassification is quite onerous. In Shadynook Improvement Assn. v. Molloy, 232 Md. 265, 269, 192 A. 2d 502, 504 (1963), Chief Judge Brune, speaking for the Court, stated the burden thusly:

". . . there is a strong presumption of the correctness of original zoning and of comprehensive rezoning, and that to sustain a piecemeal change therefrom, there must be a strong evidence of mistake in the original zoning or in the comprehensive rezoning or else of a substantial change in conditions."

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The Applicant relies upon mistake in the original zoning and not on change in character of the neighborhood. The issue of change in character of the neighborhood was not addresses in the Applicant's brief. The Applicant has taken on the task of proving error or mistake. In Boyce v. Sembly, 25 Md. App. 43 (1975), the Court stated:

"A perusal of cases, particularly those in which a finding of error was upheld, indicates that the presumption of validity accorded to a comprehensive zoning is overcome and error or mistake is established where there is probative evidence to show that the assumptions or premises relied upon the Council at the time of the comprehensive rezoning were invalid. Error can be established by showing that at the time of the comprehensive zoning the Council failed to take into account then existing facts, or projects or trends which were reasonably foreseeable of fruition in the future, so that the Council's action was premised initially on a misapprehension. Bonnie View Club v. Glass, 212 Md. 16, 52-53, 217 A. 2d 647, 651 (1966); Jobar Corp. v. Rodgers Forge Community Ass'n., 236 Md. 106, 112, 116-18, 121-22, 202 A. 2d 612, 615, 617-18, 620-21 (1964); Overton v. County Commissioners, 255 Md. 212, 216-17, 170 A. 2d 172, 174-76 (1961); see Rohde v. County Board of Appeals, 234 Md. 259, 267-68, 199 A. 2d 216, 218-19 (1964). Error or mistake may also be established by showing that events occurring subsequent to the comprehensive zoning have proven that the Council's initial premises were incorrect. As the Court of Appeals said in Rockville v. Stone, 271 Md. 655, 662, 319 A. 2d 536, 541 (1974):

'On the question of original mistake, this Court has held that when the assumption upon which a particular use is predicated proved, with the passage of time, to be erroneous, this is sufficient to authorize a rezoning.'

See Rohde, supra, at 234 Md. 267-68, 199 A. 2d 220-21; England v. Rockville, 230 Md. 43, 45-47, 185 A. 2d 378, 379-80 (1962); Pressman v. Baltimore, 222 Md. 330, 338-39, 160 A. 2d 379, 383 (1960); White v. County Board of Appeals, 219 Md. 136, 144, 148 A. 2d 420, 423-24 (1959); cf. Dill v. The Jobar Corp., 242 Md. 16, 20-21, 24, 217 A. 2d 564, 567-68 (1966); Marcus v. Montgomery County Council, 235 Md. 535, 540-41, 201 A. 2d 777, 780 (1964); Offutt v. Board of Zoning Appeals, 204 Md. 551, 558, 105 A. 2d 219, 221-22 (1954); Wakefield v. Kraft, 202 Md. 136, 144-45, 149, 96 A. 2d 27, 30 (1953); Hoffman v. City of Baltimore, 197 Md. 294, 307, 79 A. 2d 367, 373-74 (1951).

It is presumed, as part of the presumption of validity accorded comprehensive zoning, that at the time of the adoption of the map the Council had before it and did, in fact, consider all of the relevant facts and circumstances then existing. Thus, in order to establish error based upon a failure to take existing facts or events reasonably foreseeable of fruition into account, it is necessary not only to show the facts that existed at the time of the comprehensive zoning but also which, if any,

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of those facts were not actually considered by the Council. This evidentiary burden can be accomplished by showing that specific physical facts were not readily visible or discernible at the time of the comprehensive zoning, Bonnie View Club, supra, at 242 Md. 48-49, 52, 217 A. 2d 649, 651 (mineshaft and subsurface rock formation); by adducing testimony on the part of those preparing the plan that then existing facts were not taken into account, Overton, supra, at 225 Md. 216-17, 170 A. 2d 175-76 (topography); or by producing evidence that the Council failed to make any provision as to accommodate a project, trend or need which it, itself, recognized as existing at the time of the comprehensive zoning, Jobar Corp., supra, at 236 Md. 116-17, 202 A. 2d 617-18 (need for apartments). See Rohde, supra, at 234 Md. 267-68, 199 A. 2d 221. Because facts occurring subsequent to a comprehensive zoning were not in existence at the time, and, therefore could not have been considered, there is no necessity to present evidence that such facts were not taken into account by the Council at the time of the comprehensive zoning. Thus, unless there is probative evidence to show that there were then existing facts with the Council, in fact, failed to take into account, or subsequently occurring events which the Council could not have taken into account, the presumption of validity accorded to comprehensive zoning is not overcome and the question of error is not "fairly debatable." (Emphasis supplied)

In Hoy v. Boyd, 42 Md. App. 527 (1979), the Court ruled that the error must relate to the comprehensive zoning ordinance and not to the water and sewer plan or the master plan. The Court also noted that the "evidence before the zoning authority to support a reclassification based upon mistake must establish that the mistake was 'basic and actual' and made 'at the time' the property was zoned." The mistake must also relate to the specific property for which the zoning is sought and "may not consist of generalities." The Court held that change in the water and sewer plan was not a mistake sufficient to justify a rezoning.

In Howard County v. Dorsey, 292 Md. 351 (1982), the Court acknowledged that an error in the master plan is not sufficient to establish mistake in the zoning.

The Applicant's burden is well defined. The issue in this case is whether the evidence submitted is sufficient to overcome the presumption of correctness and to establish that the Harford County Council made a mistake in September 1982 when the property was zoned R4. The Department of Planning and Zoning has taken the position that no mistake occurred; that the status of Plumtree Road and Route 24 was an open question; that residential development is a suitable

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use; and that development in the area has followed the pattern anticipated in 1982. In summary, the Department recommends denial for the following reasons:

1. Current land use patterns in the neighborhood are consistent with the 1982 zoning patterns and virtually no commercial or industrial development has occurred since 1982.
2. The residential character of Tollgate Road will be extended throughout Tollgate Parkway by virtue of the existing zoning patterns and the proposed Parkway Guidelines.
3. The decision to retain Plumtree Road as a through route will not by itself change the character of the existing neighborhood.
4. The existing zoning on the site allows a fuller range of residential development options to compensate for constraints operating on the site.
5. Relocated Route 24 serves as a barrier separating the Community Center from the strong residential community to the west. The zoning pattern approved by the Council in 1982 reflects this concept.
6. The applicant has not produced any documented need for additional commercial industrial zoning in this area. The large amounts of undeveloped commercial and industrial land in the vicinity suggest there is little need for additional space.
7. The requested rezoning, if granted, would allow commercial development to threaten the integrity of existing residential development."

The Applicant's first witness was Uri Avin, a planner with Kidde Consultants, who was accepted as an expert in planning and zoning. Mr. Avin testified that during 1981 and 1982, he worked with the Department of Planning and Zoning of Harford County and actively participated with regard to the rezoning of the property. It was Mr. Avin's responsibility while then an employee of Harford County, Maryland, to review this particular piece of property. It was further his responsibility to present the information which he had secured to the County Council for recommendation with regard to a particular rezoning.

During 1981, he stated that Route 24 and Tollgate Road to Plumtree Road was planned. Route 24 relocated was a high-speed commuter road. Tollgate Road extended was a major arterial through major residential developments. In 1977 the Master Plan did not show Tollgate Parkway, and current plans do not correspond to the alignment of the Tollgate Parkway as was planned in 1977. During 1981

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and 1982, there was knowledge of the relocation of Route 24, but the details had not been finalized. According to Mr. Avin, its "final alignment had not been established." He also indicated that he did not know its exact width or its exact impact. The State Highway Administration did an environmental impact statement. The environmental impact statement was not reviewed by anyone during the preparation for the 1982 Comprehensive Rezoning. Mr. Avin also noted that the noise levels were not known in 1981 and it could not be determined as to what impact they would have upon the subject property. Mr. Avin also notes that in 1981 and during the 1982 Comprehensive Rezoning, the County had made it clear that there would be no interchange between MD Route 24 and Plumtree Road. Planning was based on the fact that there would be "no connection between Plumtree Road and relocated MD Route 24." After 1982, a decision was made that Plumtree Road would intersect with MD Route 24.

Mr. Avin noted that in 1980 the planning by the County was predicated upon the fact that Plumtree Road would not intersect with relocated MD Route 24. Mr. Avin described the existing zoning in the neighborhood (Exhibit 8), and also showed the Master Plan in 1977 (Exhibit 9). He noted that in the Master Plan of 1977, MD Route 24 Relocated was not shown in the exact location as approved and Laurel Bush Road was shown as a parallel road to MD Route 24. In Exhibit 10, the Harford County Major Road Plan, which was adopted on October 7, 1985, showed the arterial roads which are the highest level possible. This includes Tollgate Parkway, Singer Road, Wheel Road, Moores Mill Road, and Hess Road, and major collector roads such as Plumtree Road and existing Route 24. In Exhibit 11, he noted that there would be setbacks adjacent to the major road. With regard to the subject property, Mr. Avin stated that the width of the buildable area on the northern end of the property is 80 feet; that the southern tip of the subject property is 290 feet wide, with the middle at approximately 190 feet wide. He stated that R4 zoning would allow PRD apartments and that a local engineer did a concept plan which indicated a design for 80 garden apartments (Exhibit 12). He noted that the 80 garden apartments did not meet the required minimum setback of 60 feet. There were four buildings of 20 garden apartments each. He testified that typically, garden apartments are minimally 24. The length of the buildings on the plans submitted by the engineer indicated the length of the building to be 140 feet, whereas the length of the building should

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be 180 feet. Mr. Avin further noted that Route 24 is at grade in the area of the site, which is "a fact not known in 1982". With reference to Exhibit 13, Mr. Avin testified with regard to the noise impacts. He described 70 decibels to be the criteria for residential use, but that the noise level adjacent to Route 24 would be 79 dba. He stated that in the Noise Impact Study, there was an increase to 29 decibels. Mr. Avin then introduced various photographs of the property. In Exhibit 17, there was an illustrated site plan with an office/park concept, which would provide for parking in the northern and southern portion and a required buffer.

As far as the County Council's information, Mr. Avin testified that he was the area planner for that portion of the County, and had all discussions on zoning and participated in the decision making. He stated that he could speak to the information which was presented to the County Council. He testified that there were certain assumptions that the County Council made were wrong, namely, the width and the alignment of Route 24. Firstly, the Council had assumed a width of 200 feet; however, the current right-of-way measures 250 feet. Mr. Avin noted that this narrows the property and increases the effective noise impact. Secondly, at the time of the Comprehensive Rezoning, it was not known if Route 24 was to be raised or lowered. According to Mr. Avin, the decision to rezone this particular piece of property was made without that knowledge. It is presently at grade. Thirdly, Mr. Avin indicates that the Council assumed that there would not be an intersection with Plumtree Road and MD Route 24. He testified that the property was left residential, but that given the Plumtree Road connection the use of the property for commercial/industrial use would be appropriate. During the 1982 Comprehensive Rezoning, the site was not reviewed from that point of view. Mr. Avin testified that the property should be zoned CI. It is more accessible, it is more appropriate for the CI use rather than the residential use, and it is an employment intensive use.

He also noted with regard to Tollgate Parkway that the exact location at the southern point was not known. The general assumption was that Tollgate Road could be moved to the west, and this would increase the width. Since 1982, Mr. Avin cites the following circumstances to support mistake: 1) the alignment of

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MD Route 24 Relocated has been more defined, 2) the narrowness of the parcel dictates that the property should not be used for residential use, but commercial/industrial use, 3) Route 24 and Tollgate Road and required setbacks were not known at that time in 1982, 4) the connection with Plumtree Road was not known at the time that the County Council undertook its studies. In 1982, the appropriate use would be non-residential. He also noted that he did take part in negotiations between the developer and the County. He admitted that the Department of Planning and Zoning recommended R3, and the County Council adopted R4. He noted that Mr. Guy Hager, who was the Director of Planning and Zoning, did confirm that the County based its assumption that Route 24 and Plumtree Road would not have an intersection so that there was discussion with one of the County Council Members, but there was no discussion with the Council as a whole with regard to the rezoning. He also testified that Mr. Sivertsen, the Director of Economic Development, stated that there was a need for commercial/industrial zoning in this portion of the County.

Upon cross-examination, Mr. Avin noted that there were no rezonings in the neighborhood. He admitted that he made assumptions in 1980 which were proved to be incorrect. In fact, Mr. Avin admitted that he had made a mistake and thought that it was clear in 1980 that the County's intention would prevail and that Plumtree Road would be closed. He stated that he did not know whether the "Council was aware of a hearing on Plumtree Road." During cross examination, Mr. Avin was less clear as to the information that the County Council had. When asked as to whether or not the Council was aware that Plumtree Road might intersect with MD Route 24, he stated that he "did not know what they (the Council) were (was) aware of." He did admit that there would be other non-commercial uses for this property. He stated that there may be other residential purposes for this property, such as single-family dwellings, although he did not agree with it from a planning standpoint. He did note that the property could be used for both single-family and townhouses, so the property could be suitable for some low-income apartments, and that some plantings would be available to block the noise level. To reduce the noise level, he would suggest plantings if the property was zoned residential.

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Mr. Avin testified that all zoning decisions were based on presumption that Plumtree Road would be closed. He also stated that there were "numerous potential outcomes" with regard to Plumtree Road; that there was a "clear consensus that Plumtree Road might be closed." Mr. Avin did admit, however, that "what they (the County Council) knew as a body, I don't know."

Robert Lynch, the Director of the Department of Planning and Zoning, testified that no decision was resolved with Plumtree Road until July 1984. He testified that the staff recommended R3, but the Council approved R4. In fact, the Applicant had requested R4 zoning during the 1982 Comprehensive Rezoning.

Charles Duff, formerly with the Department of Planning and Zoning during the comprehensive zoning process, testified that the Department's recommendation was for the property to be R3, but that the County Council zoned it R4. He stated that he understood the State Highway plans to indicate that Plumtree Road would be open. In his opinion, the most appropriate use of the property is residential. He described an attempt within the Department to limit commercial zoning in the Emmorton area generally. Upon cross-examination, Mr. Duff admitted that the property would be surrounded by three roads, with B2 zoning on the south; that the exact location of Route 24 was not known in 1982; and that the exact location of Tollgate Parkway was not known.

Area residents then testified in opposition to the requested rezoning, indicating that it would adversely affect the community.

There is no question that the exact alignment of Route 24 and the question as to whether Plumtree Road would be open or closed were not finally determined until after the comprehensive zoning. Additionally, there is no dispute that the County Council gave individual consideration to this property. The mistake which the Applicant must prove must relate to the property itself and not to changes in plans, such as road plans, which are collateral to comprehensive zoning. See Hoy v. Boyd, supra. Thus, even assuming a mistake in the road plan, this would not be sufficient to justify a mistake in the comprehensive zoning.

In Hoy v. Boyd, supra and in Howard County v. Dorsey, the Court made clear that changes in the water and sewer plan or in the master plan were not sufficient to justify a mistake in the zoning. In the recent case of Anne Arundel County v. A-Pac, Ltd., 67 Md. App. 122 (1986), the Court considered mistake with regard to the highway plan but only upon proof that the Council acted to zone property which it anticipated would be condemned for a right-of-way. The Court stated:

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"Based upon inferences of past conduct of the Anne Arundel County Council during that period, Judge Robert S. Heise found that the subject parcel had been down-zoned to "RA" in order to deflate the value of the property for acquisition by the State in conjunction with a State highway project. . ."

"The circuit court, in reversing the Board, held that the proposed interchange was a 'significant assumption made by the Council.' We agree. The record clearly reflects that the Council mistakenly assumed the completion of the road project and based its comprehensive zoning amendment thereon. As the presumption of validity accorded the "RA" classification was overcome by the undisputed evidence that the Council's assumption was erroneous, we hold that the trial judge properly reversed the Board's action in denying the rezoning petition."

In the instant case, taking all of the testimony into consideration, there is no evidence as to what the Council knew or considered as a body which would require a rezoning of this property. Both Mr. Avin and Charles Duff admitted that they did not know what the Council knew with regard to Route 24 or its intersection with Plumtree Road. The Board cannot now undertake to rezone the property. That decision must be left to the County Council sitting as a legislative body. Viewing the testimony in a light most favorable to the Applicant, there is no proof that the County Council made a mistake in considering the R4 zoning for the property. The Applicant may well convince the Council that the property should be zoned commercial during the next comprehensive zoning, but that does not indicate that the Council made a mistake in 1982. The Council granted the zoning which the Applicant had requested. There is no evidence that the Council as a body assumed facts or based its decision upon circumstances which later proved to be incorrect. The fact that there may have been changes in the alignment of Route 24 or its intersection with MD Route 24 does not overcome the presumption of correctness of the original zoning. The mistake must relate to the property itself. What is clear from the evidence is that there was no clearly defined alignment of MD Route 24. Although at one point Mr. Avin testified that it was reasonable to assume Plumtree Road would be closed, on cross examination he indicated that he was not aware of what the Council knew. The documentary evidence supports the conclusion that the Plumtree Road intersection had not been finally determined. While the Applicant's testimony attempted to establish that the Council had acted upon the erroneous assumption that Plumtree Road would be closed, the documentation from the Applicant's witness indicates otherwise.

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The Comprehensive Zoning became effective on September 1, 1982. Applicant's Exhibit No. 20 was a letter from Uri Avin to Edward Loskot, Chief of the Bureau of Highway Design dated September 23, 1982. That letter provides in part as follows:

"Regarding other connections with Rt. 24 (R), the County reiterated its preference (emphasis supplied) for a connection at Bel Air South Parkway rather than Plumtree provided that the developers associated with this road, Tollgate Road extended and Laurel Bush Road extended on the east side of Rt. 24 (E) would commit to the construction of these roads prior to, or concurrent with the construction of Rt. 24 (R). Under these circumstances, Plumtree Road would be severed either side of Rt. 24 (R) and SHA would connect to Bel Air South Parkway."

Mr. Avin refers to the Plumtree Road closing as a "preference" and the tone of the letter does not confirm any assumption that Rt. 24 would remain closed. The purpose of the memorandum was to memorialize a meeting held on September 2, 1982, the purpose of which was to "clarify connection points to Rt. 24." In a memorandum dated October 1, 1982, (Applicant's Exhibit No. 21), Mr. Avin makes reference to the County's desired viewpoint. Again, this memorandum does not reflect any conclusion that any of the parties involved had assumed that Plumtree Road would be closed. The writer was seeking a commitment from the State. In fact, the memorandum only correctly assumes that the State had the final decision.

After reviewing the criteria for mistake, the Court in Hoy v. Boyd, supra, states:

"Applying these standards, we find error in the proceedings below for another fundamental reason. There is no evidence in the record of "basic and actual" error at the time the property was zoned in 1972. It is presumed that the placement in 1971 of these 67 acres--as well as an undetermined amount of additional acreage--in a ten-year program, represented a reasonable, prudential judgment, at that time, on the part of the planners and the County Council."

Similarly, the action of the Harford County Council in 1982 in zoning property R4 represented a reasonable, prudential judgment "at that time." The realignment of Rt. 24 subsequent to the 1982 Comprehensive Zoning does not alter that fact. There is further no clear evidence as to how the alignment of Rt. 24 played a part in the Council's determination (as opposed to the Department of Planning and Zoning's determination) regarding the zoning. Under Applicant's theory, all properties along MD Route 24 would now have to be reconsidered. The record is not clear as to exactly what consideration was given by the Council to the alignment of MD Route 24. There may have been other factors which the Council considered

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which would have negated the importance of the exact alignment of Rt. 24. Applicant's Exhibit #2 is a letter from Cypert O. Whitfill, then attorney for the applicant, requesting R-4 zoning and citing factors other than the alignment of MD Route 24 including its proximity to R4 properties. This is supported by the Department of Planning and Zoning's report. The mere fact that a road has been realigned subsequent to a comprehensive zoning is not sufficient to justify a mistake absent clear testimony that the County's decision to zone the property R4 was based primarily upon the consideration of an alignment of Rt. 24, or its intersections, which proved to be in error. That evidence was not presented in this case. The property was zoned R4 at the request of the Applicant. There is no indication that the zoning was dependent upon further study. The Council could have elected to withhold any new zoning classification for properties along Rt. 24 pending determination of its location. A comprehensive zoning does not necessarily need to include the entire County. The Council elected to zone the property even though the exact locations of MD Route 24 and its intersection with Plumtree Road were not known. This apparently met with the approval of the Applicant who requested the R4 zoning without qualification as to the alignment of Route 24 or the Plumtree Road intersection. The Applicant has failed to rebut the strong presumption of correctness of the original zoning.


Even if the Applicant had met its burden of proof, the evidence would not compel a rezoning. See Anne Arundel County v. A-Pac, Ltd., supra. There was testimony that a concept plan has been approved by the Department of Planning and Zoning which would permit development in accordance with the R4 classification. There was testimony from Robert Lynch and Charles Duff that the R4 zoning is the proper classification. The testimony of Uri Avin would be sound argument for the Council to consider during the next comprehensive zoning. However, there is no testimony to support a contention that the Applicant is being denied all reasonable use of his property which would compel a rezoning. Anne Arundel County v. A-Pac, Ltd., supra. The Applicant's expert admitted that low income housing would be a use of the property. The Hearing Examiner cannot say that this would be an unreasonable use.

Protestants Robert and Carolyn Beckelheimer made a Motion to Dismiss. The Protestants failed to cite any cases or authority which would justify such action. The Motion was made at the end of the case and not timely filed. The Motion is denied.

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For reasons cited above, the Hearing Examiner recommends denial of the application for rezoning.

Date July 10, 1986



Gregory A. Rapisarda
Zoning Hearing Examiner